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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

RONALD EARL STAHL, ET AL.,
Petitioners,

v.

THE STATE OF OKLAHOMA,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS**

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QUESTION PRESENTED

Whether the First Amendment to the Constitution of the United States protects the press from criminal prosecution for trespassing where (a) reporters peacefully entered a nuclear power plant construction site for the sole purpose of observing and reporting a bona fide news event after demonstrators had already entered the same property, and (b) press access had been restricted by state authorities in an attempt to control and limit press coverage of the event.

LIST OF PARTIES

Ronald Earl Stahl, William A. Collard, Michael D. Kelley, Vicki Jean Monks, Ben Bernstein, and David P. McDaniel were defendants in the District Court of Rogers County and were appellants before the Oklahoma Court of Criminal Appeals.

The State of Oklahoma was plaintiff-appellee in all cases.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS**

Petitioners Ronald Earl Stahl, *et al.*, pray that a writ of certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals in this matter.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court of Rogers County are not officially reported, but are printed as Appendix B (App. 26a *et seq.*) hereto, and are unofficially reported at 5 Media L. Rep. 2313. The decision of the Oklahoma Court of Criminal Appeals from which certiorari is sought, dated June 22, 1983, is not yet officially reported, but is printed as Appendix A (App. 1a *et seq.*) hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(3). The Oklahoma Court of Criminal Appeals' decision and judgment herein was rendered on

June 22, 1983. The Court of Criminal Appeals is the last court of appeal in Oklahoma for cases of this kind. 20 Okla. Stat. Ann. § 40 (1982 & Supp. 1983). On August 22, 1983, Justice White granted petitioners' timely application for an extension of time to file their Petition for a Writ of Certiorari, and authorized the petition to be filed up to and including September 20, 1983.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides, in pertinent part:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

No State shall * * * deprive any person of life, liberty or property, without due process of law * * *.

Section 1835(a) of Title 21, Oklahoma Statutes, provides:

Whoever shall willfully or maliciously enter the garden, yard, or enclosed field of another after being expressly forbidden to do so by the owner or occupant thereof shall be deemed guilty of trespass and upon conviction thereof shall be fined in any sum not to exceed Twenty-five Dollars (\$25.00); provided, that anyone who willfully or maliciously enters any such garden, yard, or field, and therein commits or attempts to commit waste, theft, or damage shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00), or by confinement in the county jail for not less than thirty (30) days nor more than six (6) months, or both such fine and imprisonment.

Section 92 of Title 21, Oklahoma Statutes, provides:

The term "willfully" when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to require any advantage.

STATEMENT OF THE CASE

Because of a key finding by the trial court, not disturbed on appeal, the issue in this case is clearly defined as whether officials of a federally- and state-regulated nuclear power plant, acting in concert with local law enforcement authorities, may manipulate the flow of information to the public.

This issue grows out of the attempt by several bona fide members of the media harmlessly to enter upon the grounds of a construction site for a proposed nuclear power plant in order to witness a protest by a group opposed to further construction of nuclear power facilities. These reporters¹ crossed onto the Black Fox site solely to fulfill their professional obligation to the public to report the events that were to take place and not in any way to incite, abet, or further the demonstration otherwise taking place, nor to impede the efforts of law enforcement authorities to maintain order or apprehend the protestors. And their conviction for trespassing followed, not from an impartial effort to protect legitimate state and private interests through enforcement of the law of trespass, but from a carefully orchestrated effort by state authorities intentionally to minimize the likelihood of critical commentary upon their action by denying the media access to the site of the demonstration.

These reporters, petitioners here, have claimed throughout the proceedings below that the First Amendment for-

¹ In addition to petitioners, a number of other members of the media also entered the grounds at Black Fox; some were prosecuted for trespassing and others were not.

bade any such attempt by state officials to silence criticism by the press, and therefore to shield their actions from public scrutiny. Before describing the lower courts' treatment of petitioners' claim, and thereafter the reasons why this Court should consider that claim, it will be helpful if we first describe the events giving rise to these prosecutions, and the officials' motivations, *as found by the trial court*, for their actions.

The June 2, 1979 Demonstration

The Public Service Company of Oklahoma ("PSO"), in conjunction with two rural electrical cooperatives,² owns a 2,206 acre tract of land in Rogers County, Oklahoma, known as the Black Fox Station, where PSO was in the process of constructing a nuclear power plant at the time in question.³ This proposed plant had aroused "significant public controversy" (App. 39a), including extensive hearings by the Nuclear Regulatory Commission respecting the suitability of the site for a nuclear power plant. The proposed plant had also attracted protest from parties opposed to its construction, including a demonstration held eight months before during which protestors had entered the Black Fox grounds in an act of civil disobedience. This demonstration led to the prosecution of several protestors for trespassing, but the

² Associated Electric Cooperative, Inc., and Western Farmers Electric Cooperative.

³ By finding that there was state action in part because PSO is the recipient of substantial federal funds and subject to federal control (App. 28a-39a), the trial court in effect treated PSO's land as public property. The majority of the judges on the appellate court also seemed to assume that the property was public, because they relied on this Court's cases dealing with the use of public property (App. 5a, 6a-7a). The dissent concluded that the property was at least quasi-public (App. 18a-19a). While it would seem clear from this recitation that the property was public or quasi-public for purposes of constitutional treatment, we need not press the point in view of the arguments made here. Even if the property were private, a criminal conviction could not stand given the facts of this case.

charges were ultimately dismissed. Several reporters had also entered the Black Fox grounds to witness the demonstration, but none was prosecuted. The demonstration involved in the instant case occurred on June 2, 1979, and led to the prosecutions now before the Court.

PSO learned of the June 2 protest in advance and thereafter, in close coordination with local law enforcement authorities, took steps to plan for it (App. 41a). As part of this preparation, PSO officials, including Harvey E. Sollars, PSO's Security Coordinator for Black Fox, met on several occasions with Rogers County Sheriff Angus Ward and Deputy Sheriff Fritz Freeman. PSO officials discussed with these law enforcement officials the manner by which the protestors would be handled and recommended that the sheriff issue citations rather than make custodial arrests (a plan ultimately followed by the sheriff). In addition, PSO officials prepared a detailed "Occupation Plan" (App. 42a) for the demonstration that included the various options for apprehending any trespassing parties as well as certain announcements the sheriff was to make (App. 42a). Because, as the trial court found, "PSO had been unhappy with the press coverage of the October 1978 protest and wished to limit press coverage of the June protest" (App. 42a), PSO also developed a plan for limiting press coverage of the demonstration, restricting the press to a "public viewing area" a mile from the point at which the protestors later entered.⁴ This plan would have effectively killed any timely press coverage of the event. Moreover, the purpose of this restriction was to prevent the media from being able to witness the demonstration. As the trial court found: "The purposes for such limitation included [(a)] preventing the protestors from 'collecting publicity,' based on PSO's belief that the demonstration did not 'deserve the kind of importance or legitimacy that

⁴ PSO did not know where the protestors would enter Black Fox and whether the press and public could view the demonstration from the designated viewing area (App. 43a).

debate and news coverage would give it' * * * and [(b)] preventing the media participation in the trespass march and 'close-up shots, interviews and battle shouts by the marchers'" (App. 42a-43a; record references omitted).

On the morning of June 2, 339 members of the Sunbelt Alliance, followed by petitioners and other reporters who were present solely to witness the demonstration, entered the Black Fox property and, after being admonished by a PSO official to leave, were arrested by the sheriff. Neither the place where the demonstrators entered Black Fox nor the place where they were arrested could be observed from the designated viewing area or from outside the fence forming the perimeter of the site (App. 46a).⁵ Petitioners were cited for trespass, despite the fact that they had not interfered with any construction activity at the site or with any action of the sheriff in arresting the members of the Sunbelt Alliance (App. 47a-48a).

The Lower Court Proceedings

After their arrest and citation, petitioners were prosecuted before the District Court of Rogers County for trespassing after being warned in violation of Okla. Stat. Ann. tit. 21, § 1835(a). Tried without a jury, petitioners were convicted and were each fined \$25.00. Ironically, the demonstrators prosecuted for trespassing were discharged after their trial resulted in a hung jury.

In a post-trial ruling on petitioners' motion to dismiss, the District Court rejected petitioners' First Amendment claims and entered findings of fact and conclusions of law on the issue (App. 26a-69a). The court first concluded that PSO's actions in connection with the June 2 demonstration constituted state action for the purposes of

⁵ Roughly 15-20 reporters had attempted to observe the events from the viewing area. Finding that vantage unworkable, however, they asked for, and were granted, permission to move closer to the demonstration site, and were taken to a position 30 yards from the site. However, they still were not able to see all of the unfolding events even from this position (App. 46a).

the federal and state Constitutions (App. 48a-49a). The court based this conclusion upon the extensive regulatory control and financial support of PSO by several federal and state regulatory agencies (App. 49a; *see id.* at 28a-39a), as well as upon the "working relationship" that had existed between PSO and law enforcement authorities with respect to their combined efforts to control arrest, and book the demonstrators and petitioners (App. 49a; *see id.* at 41a-43a, 48a).

On the merits, the District Court recognized that "a right of reasonable access to newsworthy events exists under the protection of the First Amendment" (App. 52a), but ruled that petitioners' convictions were nonetheless valid. As noted above, the court expressly found that "[t]he intent of PSO in exercising restrictions on the press was admittedly to limit the content of the news which would be later distributed by the media" (App. 53a)—a design the court characterized as "ignoble" and "hardly compatible with the rights of a free people" (App. 53a). Nevertheless, the court concluded that, on balance, the restrictions imposed upon petitioners by PSO and the police were minor, and any burden resulting therefrom was outweighed by the state's interests in protecting PSO's property and in maintaining order at the demonstration site (App. 54a-55a).

On June 22, 1983, over three years later, the Oklahoma Court of Criminal Appeals, by a 2-1 vote, affirmed the judgment of the Rogers County District Court. First, the court concluded that petitioners had violated Okla. Stat. Ann. tit. 21, § 1835(a) (West Supp. 1982-1983), by entering the PSO property at Black Fox (App. 2a-3a, 15a). In so doing, the court rejected the argument that, because of the substantial First Amendment issues present in the case, a higher *mens rea* than simple wilfulness, as defined by Okla. Stat. Ann. tit. 21, § 92 (West 1958) (see pp. 2-3, *supra*), was required to sustain a conviction under Section 1835(a) (*see* App. 2a-3a).

Turning to petitioners' First Amendment claims, the majority, over Judge Brett's dissent, rejected the argument that the First Amendment protected reporters against a criminal prosecution for peacefully entering upon public property for the limited purpose of observing, and thereafter reporting, the demonstration held by the Sunbelt Alliance at Black Fox (App. 4a-7a). At the outset, the majority noted, and did not disapprove, the District Court's express finding that "a sufficiently close nexus existed between the actions of PSO and the state and federal governments to fairly treat the actions of PSO as the actions of government itself" (App. 4a). Furthermore, the majority did not disapprove the District Court's finding that PSO had structured its handling of the media on the day of the demonstration for the express purpose of avoiding what it perceived would be critical medial coverage of the event (App. 53a).⁶ Instead, the majority ruled that these findings were irrelevant because, as a matter of law, petitioners' First Amendment claims lacked merit (App. 5a).

Relying upon PSO's general media access policy, rather than the specific motives prompting PSO on the day in question, the majority concluded that PSO needed to regulate access to its facility by the media to avoid accidents and vandalism by entrants (App. 5a). The majority concluded, by relying upon a variety of decisions in which the press actively attempted *itself* to provide the newsworthy events (App. 5a-6a), that the press enjoyed no First Amendment protection for its newsgathering function where the need to obtain information required the press to commit the technical tort of trespass (*id.*). Finally, the majority ruled that

⁶ To the contrary, the majority noted that "there is evidence that the overall PSO press arrangements for the June event were based in part on a desire to minimize the effectiveness of the demonstration * * *" (App. 5a).

neither the press nor the public had any right of access to the PSO facility because it was neither a public street, sidewalk, nor park (App. 6a-7a).

In dissent, Judge Brett, relying almost exclusively upon numerous First Amendment decisions of this Court (App. 16a-23a), concluded that the convictions violated the Oklahoma state constitutional guarantee of freedom of the press, and he therefore would have reversed the convictions on this ground alone, without having to resort to the First Amendment (App. 10a).⁷ Interpreting this Court's decisions respecting access by the press and public to government information, Judge Brett concluded that "any press access claim to government information is subject to a degree of restraint dictated by" a balancing test which measures the nature of the forum and information sought against the countervailing government interests (App. 17a), and which also takes into consideration "the purpose and motive behind the abridging action" (App. 18a). Performing that balance, he concluded that the state's interest in prosecuting petitioners to maintain order was speculative at best, and was, in fact, belied by the District Court's express findings that petitioners were in no danger from construction hazards and the demonstration was entirely peaceful (App. 20a-21a).⁸ He also rejected the state's asserted need to protect PSO's property because, as the District Court had found, PSO had no reason to believe, and did not in fact believe, that the reporters' presence would cause any harm to Black Fox

⁷ Judge Brett's reliance upon this Court's decisions as authority for his interpretation of the analogous Oklahoma constitutional provision (*see* App. 10a n.1), however, strongly suggests that he would have grounded his decision in the First Amendment had he been forced to reach that issue (*see* App. 17a).

⁸ "It could be argued that the presence of the press, by assuring full accountability, diminished the possibility of a violent confrontation and very possibly assured that everything remained peaceful" (App. 21a).

or the facilities there (App. 22a). Finally, he also concluded that "the illegitimate purpose of controlling the kind of news story the press would later distribute to the public" (App. 23a) undermined any claim that the restriction qualified as a valid regulation of the time, place, or manner of petitioners' access. Accordingly, he concluded that, on the facts of this case, the convictions were constitutionally flawed.*

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Petitioners raised and argued the First Amendment question presented herein before the District Court of Rogers County and the Oklahoma Court of Criminal Appeals, and both bodies specifically ruled on the issues (App. 3a-7a, 50a-55a).

REASONS FOR GRANTING THE PETITION

This case presents the Court with a rare opportunity. Demonstrations are increasing in number, size, variety, and importance in this country. All of the problems attendant upon covering them by the media are similarly increasing. Yet, because of the confused and often hostile atmosphere in which demonstrations take place, courts seldom are able to sort out just what occurred, much less the motivations of those in charge of policing them. It is extremely difficult, therefore, for this or any court to lay down guidelines for the press in its attempt to do its job when these demonstrations occur.

In this case, however, the trial court was able to determine with particularity all of the surrounding facts,

* "I do not say that the press has an absolute right to go on public property to gather news. I would only hold that our criminal trespass statute cannot be used arbitrarily and unreasonably to exclude the press from their constitutionally protected news gathering role on public property when the State does not present a legitimate or important countervailing interest" (App. 24a).

and it was also able to pinpoint just why the authorities acted as they did. For example, its findings, taken as a whole, clearly establish that petitioners:

- did not originate the idea, design or plan of the demonstration;

- did not create the incident or take the lead in any part of it;

- followed rather than led others onto the property;

- did not join and were never participants in the demonstration;

- neither instigated nor incited the participants;

- did not engage in ruse or subterfuge in order to gain entry to the property;

- entered the property as quietly and peaceably as the circumstances would allow;

- did not impede or interfere with the policing of the demonstration;

- were never obstreperous, boisterous, vocal, or unruly;

- did not damage the property or harm any person;

- entered the property solely for the purpose of covering the news event, and

- did not falsely report the event.

The trial court was also able to pinpoint the motivations of local officials: to control and diminish media coverage because of *their* judgment that the news event would be over-publicized and, presumably, embarrassing to them and to nuclear power.

Thus, this case represents a rare opportunity to spell out what the rights and privileges are of the press and public, and what the limitations are on the exercise of state action, in the increasingly volatile area of public demonstrations.

A number of distinct but allied lines of decision intersect at the facts of this case.

The Court has recognized, for example, that reasonable regulations of the time, place or manner of communication are valid only so long as those restrictions are not based upon the content or subject matter of speech. *See, e.g., Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-537 (1980). The Court has also ruled that newsgathering by the media is entitled to some degree of constitutional protection. *E.g., Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972); *Pell v. Procunier*, 417 U.S. 817, 833 (1974). More recently, in the context of public trials, the Court has given life to the doctrine that the First Amendment affords some measure of constitutional protection to the public and to its agent, the press, with regard to the obtaining of information necessary for informed public decisionmaking. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982). And numerous lower federal and state courts have ruled that otherwise-applicable state trespass laws must give way in the face of more important public interests, like those present here. *See* cases collected at 67 Op. Md. Att'y Gen. No. 82-024 (July 19, 1982).

The instant case presents elements of each of these doctrines and represents the logical next step in their development.

1. Thus, for example, the restrictions on the press in this case cannot be justified on the ground of prevention of violence. This is so not only because violence was not present or imminent but because the motivation for the restrictions was otherwise. The reason the press was restricted was so that publicity would be curtailed. There could hardly be a restriction more directly related to the content of speech than this one. Surely, if the police had said to petitioners, "You can enter the property only so long as you agree not to publish," or "• • • only so long as you agree to report the event in a favorable light," or

"* * * only so long as we can approve in advance what you write," there would be no question but that the restriction would be struck down. Yet the situation here is really no different in purpose and effect. The authorities having determined that (a) they did not wish unfavorable publicity; (b) the demonstration was, in their eyes, an untoward event; and, therefore, (c) any publicity surrounding the event was bound to be unfavorable, they simply precluded the press from following and covering the event on pain of criminal prosecution. This is the very type of censorship precluded by the *Consolidated Edison* line of cases.¹⁰

2. Well before *Richmond Newspapers* and *Globe Newspaper* explicitly anchored in the First Amendment the public's interest in obtaining from government information essential for participatory democracy, this Court had often recognized that the central and overriding subject of the First Amendment was its protection of the public's free discussion and receipt of information and opinions respecting government. See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966). Having pointed to "the paramount public interest in a free flow of information to the people concerning public officials, their servants" (*Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)), the Court took steps to make certain that this interest was neither arrested nor chilled by prior restraints, civil damage suits, or after-the-fact criminal prosecutions. See, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, *supra*. Moreover, the Court had also ensured that public discussion of the criminal process—indisputably, the function of government most coercive of its citizens and, therefore, most in need of scrutiny—would be wholly

¹⁰ Since the state may not enact, it *a fortiori* may not enforce, a statute with the intent to censor or penalize the press for performing its constitutionally recognized function. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 103 S. Ct. 1365, 1369-75 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

unfettered, absent the most exacting showing of need to limit debate. *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (publication of juvenile records); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (publication of the names of victims); *Craig v. Harney*, 331 U.S. 367 (1947) (criticism of ongoing trial).

Richmond Newspapers reinforced and augmented that protection by assuring that the public would have access to the information necessary to meaningful discussion of government. Consistent with the Framers' belief that public access to information respecting such matters was essential to participatory democracy,¹¹ *Richmond Newspapers* and *Globe Newspaper* recognized that the structural role played by the First Amendment in protecting public oversight of government affairs entitled the public and press to attend criminal trials. These decisions bar the government from shutting off the public's access to this aspect of the criminal process absent a compelling governmental interest, expressed in specific findings to that effect, narrowly tailored to serve that particular interest. *Globe Newspaper*, 102 S. Ct. at 2619-20; *Richmond Newspapers*, 448 U.S. at 580-581 (plurality opinion); *id.* at 597-598 & n.24 (Brennan, J., concurring in the judgment).

These cases acknowledged that, at least with respect to the most open facet of the criminal process, the First

¹¹ *See, e.g., Proposed Bill for the More General Diffusion of Knowledge* (T. Jefferson), reprinted in 2 *The Writings of Thomas Jefferson* 220-221 (P. Ford ed. 1893) ("[W]hereas * * * experience hath shewn, that even under the best forms, those entrusted with power have, in time, * * * perverted it into tyranny; * * * it is believed that the most effectual means of preventing this would be, to illuminate, as far as practicable, the minds of the people at large * * *"); Letter from James Madison to W.T. Barry, Aug. 4, 1822, in 9 *Writings of James Madison* 103 (G. Hunt ed. 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives").

Amendment not only protects the public's ability to engage in discourse but also ensures that the governmental institutions responsible therefore are kept within the ambit of public scrutiny. In this case, the question is whether the public, or the press as agent of the public, has a similar right of access to the information necessary to form responsible judgments about the actual operation of an anterior stage of that process.

3. (a) This question is of substantial interest to the public and is of especial interest to the press because of the media's institutional role in obtaining and disseminating information to the public. The wisdom, and often-times the legality,¹² of the decision to commit the Nation's resources to, and subject future generations to the hazards of, nuclear power are, of course, matters of intense legislative, administrative, and scholarly debate.¹³ Often-times, the parties attempting to influence the outcome of that debate resort to drastic means to make their position heard. Demonstrations of the type that took place on PSO's Black Fox property are not isolated incidents.¹⁴

¹² See, e.g., *Baltimore Gas & Elec. Co. v. NRDC*, 103 S. Ct. 2246 (1983); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 103 S. Ct. 1713 (1983); *Duke Power Co. v. Carolina Env'tl Study Group, Inc.*, 438 U.S. 59 (1978).

¹³ See, e.g., *NRDC v. NRC*, 685 F.2d 459, 525-526 n.60 (D.C. Cir. 1982) (Wilkey, J., concurring in part and dissenting in part) (collecting administrative and legislative studies of the problems of nuclear waste disposal), *rev'd sub nom. Baltimore Gas & Elec. Co. v. NRDC*, *supra*; *Report of the Energy Project at the Harvard Business School* 127-166 (R. Stobaugh & D. Yergin eds. 1979); S. Glasstone & W. Jordan, *Nuclear Power and its Environmental Effects* (1980).

¹⁴ For example, recent television footage of protestors pushing through the gates and onto the grounds of the Russian Consulate in Glen Cove, New York, following the shooting down of a Korean passenger plane, showed television cameramen being virtually carried onto the property in the midst of the crowd. Regardless of how one views this forced entry, it was certainly a newsworthy event that warranted coverage. And it (a) the police had used excessive force against the protestors once they were inside the

To the contrary, such assemblies, whether performed on government property or in the streets and parks, whether accomplished under a permit or by means of trespass, and whether accompanied by violence or done entirely peacefully, have become an established part of the domestic political scene since the Boston Tea Party in 1773, and increasingly so in recent years.

While demonstrations like that taking place at Black Fox are normally peaceful and do not involve the participants' trespass upon public property, that is not always the case. But the need for complete information as to the actions of the participants in expressing their views, and the police in attempting to control the protest or squelch a disturbance, is the same. Demonstrations involving trespassing are of no less importance to the public than those occurring entirely and lawfully upon the public streets and parks. Whether civil disobedience is seen as ennobling or sullyng a speaker's cause, the fact of that disobedience is plainly of importance to the public debate over a governmental issue, particularly one of such pressing importance as is the issue underlying the events at Black Fox. The question presented by this case, therefore, is one never before fully addressed by the Court but one which nevertheless is likely to recur with increasing regularity. It is of sufficient public importance to warrant this Court's review, particularly since it occurs against the background of an alleged "offense" that already stretches constitutional limits.¹⁵

grounds, or (b) the protestors had wantonly destroyed property, that too should have been covered even if it meant the reporters had to follow the crowd.

¹⁵ The Court of Criminal Appeals, in response to the argument that petitioners "lacked the requisite criminal intent since they entered the land only to gather news, not to violate the rights of the landowners or engage in other unlawful behavior" (App. 2a), concluded that petitioners "need not have intended to violate any laws or injure the landowner in order to have committed trespass" (App. 3a). As thus interpreted, Oklahoma's criminal trespass statute does

(b) Limited public or press access to property to observe police regulation of demonstrations is also necessary to afford the public the opportunity to engage in effective oversight of police practice in handling such matters. Access to criminal trials is plainly insufficient in this regard. The everyday role of the police in maintaining order generally escapes judicial scrutiny because the obstacles to litigation over such police practices have limited judicial review typically to only those aspects relating to the acquisition of prosecution evidence.¹⁶ For various reasons,¹⁷

not require any evil intent. Rather, it merely requires the antecedent intent to commit an act.

This Court has stated that "[c]riminal liability is normally based upon the occurrence of two factors, 'an evil meaning mind [and] an evil-doing hand . . .'" *United States v. Bailey*, 444 U.S. 394, 402 (1980), citing *Morisette v. United States*, 342 U.S. 246, 251 (1952). Thus, in *Smith v. California*, 361 U.S. 147 (1959), the Court noted that while states are free to create strict criminal liability by dispensing with a scienter element, there still exist constitutional limitations on the exercise of their police power, particularly where the elimination of a scienter requirement "may tend to work a substantial restriction on the freedom of speech and of the press." *Id.* at 150. See also *Bowie v. City of Columbia*, 378 U.S. 347, 358 (1964) ("[u]nless a trespass is 'committed under such circumstances as to constitute an actual breach of the peace, it is not indictable at common law, but is to be redressed by a civil action only'"; emphasis in original); *Martin v. City of Struthers*, 319 U.S. 141, 147-149 (1943) (ordinance making it unlawful trespass to knock on doors and ring doorbells to distribute literature held in conflict with freedom of speech and press).

These same constitutional guarantees should prevent the State of Oklahoma from imposing criminal sanctions on reporters who had no evil intent to trespass or even to participate in a demonstration, but who merely intended to follow the course of events as they were occurring and report accurately thereon.

¹⁶ See, e.g., Amsterdam, *The Supreme Court and the Rights of Suspects In Criminal Cases*, 45 N.Y.U.L. Rev. 785, 786-788 (1970); Goldstein, *Administrative Problems in Controlling [sic] the Exercise of Police Authority*, 58 J. Crim. L.C. & P.S. 160, 168 (1967). See also *Rizzo v. Goode*, 423 U.S. 362 (1976).

¹⁷ See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Salvucci*, 448 U.S. 83 (1980); *Rakas v. Illinois*, 439 U.S.

the instances in which *Richmond Newspapers* and *Globe Newspaper* ensure that the public's oversight of the criminal process will be adequate are often quite restricted. In addition, the likelihood that any police practices giving rise to litigated issues will be open to the public is lessened further still by the commonplace practice of litigating such matters at pretrial suppression hearings, from which the public is frequently excluded. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). Finally, the deficiencies in tort remedies, whether for damages or injunctions, as a supplement to the exclusionary rule are, by now, well-known,¹⁸ and are therefore unlikely to bring to light a significant, additional number of instances of police illegality.

At the same time, however, the public need for complete information as to the nature and extent of such law enforcement operations cannot be underestimated. A number of factors—including the decentralized nature of most police functions¹⁹ and, in some instances, the racial animus prompting or caused by such activity²⁰—manifest a need for public oversight of such day-to-day police functioning. Since the citizenry is ultimately responsible for the enactment of the penal laws enforced by the police, the public, in order effectively to discharge that responsibility, must be able to obtain complete and accurate information respecting the actual conduct of police affairs. This is

128 (1978); *United States v. Caceres*, 440 U.S. 741 (1979). See also *United States v. Payner*, 447 U.S. 727 (1980).

¹⁸ See, e.g., *Los Angeles v. Lyons*, 103 S. Ct. 1660 (1983); *Rizzo v. Goode*, *supra*; *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 421-422 (1971) (Burger, C.J., dissenting). See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 360 (1974); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955).

¹⁹ See, e.g., K. Davis, *Discretionary Justice* 222 (1969).

²⁰ See, e.g., *National Advisory Comm'n on Civil Disorders*, Report 93 (1968); *The President's Comm'n on Law Enforcement and Administration of Justice*, Task Force Report: *The Police* 146-148 (1967); *President's Comm'n on Crime in the District of Columbia*, Report on the Metropolitan Police Dep't 62-65 (1966).

particularly true where, as here, there exists the chance that the police may be called upon to exercise force in response to the actions of fellow citizens over which the government has granted the police a monopoly. The need for the public to make informed judgments with regard to such matters, we submit, outweighs the incremental and, in this case, nonexistent burden upon state interests resulting from the harmless actions of petitioners in entering upon the Black Fox grounds.

(c) Petitioners do not claim that their right of access to the grounds at Black Fox is absolute or that anyone claiming an interest in the events taking place in circumstances like those here is entitled to access for any reason. Petitioners do not dispute the state's need to maintain order and prevent violence, and do not challenge the state's interest in protecting the rights of property owners. Petitioners' claim is quite narrow. There is no claim in this case of a First Amendment right to enter public or private property at all times and under all circumstances. Nor is there any question as to the power of law enforcement authorities to prohibit access during riots or other institutional emergencies, or to prohibit interviews with persons who are dangerous or who present other similar, specific problems. None of those circumstances obtained at Black Fox on June 2, and the Court's decision here therefore need not take into account the state's interests in such circumstances.

This case, therefore, does not involve a myriad of problems raised in other cases dealing with press access, including invasions of privacy,²¹ interference with the conduct of a trial,²² attempts to obtain national security information,²³ and a reporter's active participation in an

²¹ Compare *Commonwealth v. Wiseman*, 249 N.E.2d 610 (Mass. 1969), cert. denied, 398 U.S. 960 (1970).

²² Compare *Estes v. Texas*, 381 U.S. 532 (1965).

²³ Compare *Zemel v. Rusk*, 381 U.S. 1, 16 (1965).

incident himself in order to create a news story that would not otherwise exist.²⁴

What petitioners do claim is the right to reasonable access to property peacefully to witness a newsworthy demonstration that has already entered upon the property, absent other exigent circumstances. And, in particular, they claim the right to be free from restraints upon such access which are specifically designed to impede their public function of gathering news about matters of public concern—an intent on the part of authorities rightfully labeled “ignoble” by the trial court. The question presented here can therefore be decided quite narrowly, despite its extraordinary importance.

CONCLUSION

For each of the reasons outlined above, we urge the Court to grant certiorari and reverse the judge of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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²⁴ Compare *Branzburg v. Hayes*, *supra*.